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Secretary of Labor,
Complainant,

v.

Florida Power Corporation,
Respondent,

and

I.B.E.W., Local Union 433,
Authorized Employee
Representative.

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OSHRC Docket No. **97-1915**

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Appearances:

Robert L. Walter, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

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Sheri Davis McWhorter, Esq.
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For Respondent

Mr. Walter Shaffer
Dunnellon, Florida
For Employee Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Florida Power Corporation (Florida Power) contests the November 6, 1997, citation issued to it as a result of the Occupational Safety and Health Administration's (OSHA's) inspection of its maritime coal-handling operation. OSHA scheduled the inspection after it received a complaint that Florida Power was operating a defective crane. The inspection began on July 31, 1997, and covered the period from July 28 to July 31, 1997. The Secretary found the complaint to be valid and cited Florida Power for a violation of § 1918.74(a)(8). Among other things, Florida Power contends that the cited standard was not applicable to its shore-based cargo handling operations. For the reasons stated, Florida Power's contention is correct.

The hearing in this case was held on March 30 and 31, 1998, in Tampa, Florida.

The Cited Standard

The Secretary alleges that Florida Power used a crane having a visible defect which affected its safe operation. The standard cited, § 1918.74(a)(8), provides that:

(a) The following requirements shall be met in the use of cranes, whether hoisted aboard a vessel for use thereon or used to service a vessel from the dock, shore, or another vessel, and in the use of any other crane or derrick not a part of a vessel's permanent equipment, but used in longshoring operations: . . .

(8) No crane or derrick shall be used in any case where a visible defect affecting safe use exists.

Section 1918.74(a)(8) falls under Part 1918, the longshoring standards. Effective on January 21, 1998, § 1918.74(a)(8) was partially amended and consolidated into new § 1918.66(b)(3)(ii);¹ and § 1918.74(a)(8) was repealed (62 FR 40152; July 25, 1997). The fact that a subsequently enacted standard may alter or change a safety requirement does not relieve an employer from its obligation to comply with the currently operative standard, in this case with § 1918.74(a)(8).

Background

Florida Power operated four fossil fuel (coal) electrical generating plants at its Crystal River Energy Complex in Crystal River, Florida. It also operated a nuclear power plant at the same location (Tr. 10).

Barge and train systems delivered the fossil fuel used by the Complex's electrical generating plants. Loaded with 9,000 to 12,000 tons of bulk coal, each ocean-faring barge came into the Florida Power intake canal from the Gulf of Mexico and docked at the pier by the south coal yard (Tr. 334). Florida Power used a "barge unloader," a 15-ton Dravo gantry crane, to unload the coal from the barge.

¹ § 1918.66(b)(3)(ii) provides:

(3) *Prohibited usage.*(ii) No crane or derrick having a visible or known defect that may affect safe operation shall be used.

The current § 1918.66 does not contain the prefatory language of § 1918.74(a) and could not support the argument the Secretary makes in the instant case.

The Barge Unloader

The barge unloader was shore-based, that is, it was mounted on Florida Power's waterfront dock. The barge unloader did not go onto the barge or into the water, but it could be positioned over and above the water, as it moved approximately 300 feet up and back along the dock on railroad-type wheels running on fixed tracks. The barge unloader extended approximately 120 feet above the ground level (Tr. 14-15, 170). It supported a 15-ton clam shell bucket. The bucket was operated from a cab suspended beneath the barge unloader's gantry arm. The operator sent the bucket down into the barge for coal, traveled it back along the trolley to the hopper, dumped the coal into the unloader's hopper, and then trolleyed back out over the barge for more coal. The hopper discharged the coal onto conveyers which transported the coal to the south coal yard (Tr. 11-14).

The barge unloader had mechanical/electrical "limit switches" or "limits" designed to stop the bucket from going too far in any direction (Tr. 19). The barge unloader responded to motor overloads by "tripping." If the barge unloader experienced an electrical "trip," the power was shut off until it was reset. If the bucket was moving when the machine tripped, the bucket would continue to fall through the limit switches until static braking caught the bucket (Tr. 159-160).

Problems With the Barge Unloader

In November 1994, Florida Power installed a Robicon DC drive computer system into the barge unloader. The unit controlled the barge unloader's electric motors, including the motor which moved the clam shell bucket. Although there were periodic problems with the bucket's dropping through the limit switches prior to 1977, these were usually resolved by Florida Power's maintenance electricians (Tr. 15-19, 23). By April 1977, the barge unloader's problems tripping and losing control of the bucket had become "worrisome to everybody" (Tr. 16). The following chronology is based on the supervisor's logs and testimony at the hearing:

1. On April, 11, 1997, Coal Yard Supervisor Sammy Howell advised his supervisor Roy Carr that the barge unloader was unsafe because the trips to the system permitted the bucket to fall through the automatic limit switches (Tr. 496-497).
2. On April 12, 1997, Carr witnessed the problem for himself when the unloader tripped and the bucket fell through the limits about 100 feet, almost to the ground.

Florida Power decided to shut down the crane's operation until the manufacturer's representative could correct the problem (Exh. C-3, p.1; Tr. 264).

3. On April 14, 1997, the manufacturer's representative and Florida Power's Special Maintenance Electrician Walter Shaffer unsuccessfully looked for the cause of the ongoing problem. The operator ran the barge unloader so that the problem could be observed and continued to operate to unload the coal (Tr. 25). Problems continued over the next month (Exh. C-4, C-5).
4. On May 13-14, 1998, "[t]he unloader went crazy again," according to Shaffer, but he could not determine why the bucket was dropping or get it to stop (Tr. 39). The manufacturer's representative returned but could not correct the problem. The operator stated that he was operating the barge unloader "under protest" because "he thinks it is unsafe" (Exh. C-5, p.3).
5. On May 16, 1997, the manufacturer's representative was again unable to determine what was causing the barge unloader to trip. The supervisor ordered that "[a]ny trips on barge unloader are to be reset until barges are finished. This is all that can be done at this point" (Exh. C-6, p.3).
6. Between May and June 24, 1997, the barge unloader continued to malfunction. For example, on June 7 the "unloader . . . keeps tripping out time after time. Bucket fell 4 feet" and "bucket fell on hopper" (Exch. C-7, p.1).
7. By July 22-23, 1997, Florida Power came to believe that Robicon's information was not fully accurate (Tr. 507). The "unloader [was] going crazy" and "bucket hit #1 hold" (Exh. C-12, p.3; Tr. 84-85).
8. On July 24, 1997, the manufacturer's representative returned and advised Florida Power that it would be unable to correct the problem and did not know what else could be done to try to fix it. Florida Power decided to replace the unloader's Robicon unit with a new computer-drive unit (Exh. C-12; Tr. 514-515).
9. Later, Operations Superintendent Richard Laxton advised that since there were "three more barges in the pipeline that we had to get unloaded; that we were going to have to run it until we got them unloaded" (Tr. 147).
10. On July 28, 1997, the barge unloader's bucket continued to fall, one time hitting a beam on the hopper and falling on top of the barge hatch. Operations Superintendent Laxton stated that the barge unloader would be shut down until it was fixed. Two hours later, Florida Power again unloaded coal with the barge unloader. The operator advised that he was working "under protest." The

payloader was set in the hold, although the “unloader [was] tripping every two buckets or so. Getting worse as we go” (Exh. C-12 p.7-9; Tr. 239, 268, 278).

11. On July 29, the bucket fell onto the top of the hopper (Exh. C-12, p.10; Tr. 283-284). The unloader was used until that barge was unloaded. Four hours later, Florida Power ordered a new barge to be unloaded. The shift operators advised their supervisors that they were operating the barge unloader under protest. Operations Superintendent Laxton replied that, “They told him that it was as good as it was going to run and we were going to run it” (Tr. 243-244).
12. On July 31, 1997, after that barge was unloaded, Florida Power directed a newly-arrived barge to be unloaded. At 1:30 a.m. “[the operator] was going back into barge hold when bucket almost cleared hatch -- the bucket stopped by itself then took off to the north -- bucket hit side of hatch and bucket twisted -- wrapping cables” (Exh. C-13, p.12). The shift supervisor instructed the operator “to take his time and discharge barge as safe as we can.” After three successive trips between 6:30 a.m. and 9:30 a.m., “[the operator] said bucket on barge unloader did not come up to limit -- he hit hatch #2 inside hand rail -- one pole was bent but not broken (Exh. C-12 p.14; 144-145). OSHA’s investigator Richard Andree arrived around 10:00 a.m., and the barge unloader was taken out of service.

Working With and Around the Barge Unloader

Employees worked with and around the operating barge unloader during the period at issue.² During the shift change, the operators climbed to or from the control cab by a stairway running up the side of the unloader (55-58).

When the barge unloader had picked up as much coal as it could from the hold, the barge unloader operator attached a “payloader” to the bucket and lowered it into the hold. An employee called a “fuel handler” stood in the hold, and using hand signals directed the placement of the payloader (Tr. 48, 255-256, 259, 271). Fuel Handler Martin Good was usually 20 to 25 feet from the payloader as he directed the load into place. Shaffer saw fuel handlers who were 15 to 20 feet from the payloader (Tr. 99, 318). The fuel handler used the payloader to pile up the remaining coal so that it could be removed by unloader’s clam shell bucket (Tr. 47-49, 318).³

² Because of the disposition of the case, it is unnecessary to determine whether the employees were “exposed” within the meaning of the Act.

³ Additionally, although it is unclear if an employee designated the “hold man” was usually on the barge when the payloader was placed in the hold, a hold man was on the barge on July 28, 1997 (Exh. E-12, p.10; Tr. 97-100).

Laborers were also on the barge while coal was being unloaded. The laborers swept the coal, which spilled from the bucket onto the hatches, back into the hold of the barge. Laborers were as close as 2 to 4 feet from the hold where the bucket was operating (Tr. 71, 254, 272, 319).

Shaffer advised the supervisor that “deck hands were all over, under the hatch and around where we were operating. The control was so erratic, I was concerned with their safety” (Tr. 102). The Captain of the barge was notified “to make sure he[’d] have his crew stay away from barge unloader bucket” (Exh. C-12, p.10).

Analysis

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Does the Standard Apply? -- Longshoring or Marine Terminal Standards

Florida Power maintains that the Secretary cited it under the wrong standard. It raises the question of whether the marine terminal standards of Part 1917 (Subpart H) alone apply to its shore-based material handling operation, or whether (as the Secretary argues) the longshoring standards of Part 1918 (Subpart G) also applied. Florida Power asserts that it “would be subject to the standards of Part 1917 for marine terminals, if at all, rather than the Part 1918 for longshoring operations” (Resp. brief, p.24).⁴

The parties emphasize different sections of the regulations. The Secretary relies on the language of the particular standard. She does not address the relationship between the longshoring and marine terminal standards. Without further explanation, compliance officer Richard Andree concluded that this longshoring standard applied because “unloading the ship’s cargo [was] the basic definition of longshoring” (Tr. 344).

⁴ Florida Power’s “*if at all*” language apparently refers to a specific exemption found in the 1917 standards for “fully automated bulk coal handling facilities contiguous to electrical power generating plants” §1917.1(a)(1)(iii). Whether Florida Power’s coal handling operations, which involved the participation of employees located on the barge being unloaded, could be considered “fully automated” under § 1917 was not litigated.

In pertinent part, § 1918.74(a) applied to a crane “used to service a vessel from the dock [or] shore” if the crane was “used in longshoring operations.” Longshoring operations included “unloading, moving, or handling cargo . . . out of any vessel on the navigable waters” At first reading, this language might appear to govern the factual circumstances here. Nevertheless, as Florida Power contends, the existence of the Part 1917 marine terminal standards creates an ambiguity in the application of this longshoring standard. It is a well-accepted tenet of statutory construction that a statute must be interpreted as a harmonious whole. Even “the title of a statute or section can aid in resolving an ambiguity.” *I.N.S. v. Nat. Center for Immigrants’ Rights*, 112 S.Ct. 551 (1991).

Prior to 1983, Part 1918 covered most aspects of maritime cargo handling, whether it was shore based or vessel based. On July 5, 1983, OSHA added new Part 1917 to consolidate shipyard requirements for marine terminals into one set of related standards (48 FR 30886 - 933). At the same time, OSHA made minor revisions in the 1918 standards. After the 1983 amendments, Part 1918 remained substantially the same as when OSHA originally adopted the Longshoring Standards in 1971 under Section 6(a) of the Act.⁵

Regardless of the language of 1918, an excerpt from the 1983 preamble to Part 1917 clarified that Part 1917 was intended to be a “vertical” standard, one which specifically applied to the marine terminal industry (48 FR 30886, 1983):

The coverage of Part 1917 includes all shoreside activities within a marine terminal -- except those which are specifically exempted in the standard, as outlined in greater detail below. In clarifying the boundary between Part 1917 and Part 1918, OSHA’s shipboard longshore regulations, the Agency has set the foot of the gangway to mark the limit to which Part 1918 may be applied landward. Similarly, part 1917’s jurisdiction extends out to the ship no further than this point of the gangway.

An employer might be subject to both the marine terminal and the longshoring standards, because its activities may have been both shore *and* vessel based. The distinguishing point from which a certain activity was covered by either standard, however, remained the same, whether it was described as the “foot of the gangway” or the location at which the crane or derrick was

⁵ The longshoring standards, which became effective on January 21, 1998, were OSHA’s first undertaking to substantially rewrite the 1918 standards (62 FR 40152).

mounted.⁶ The fact that many of the safety requirements were the same or similar for both Parts 1918 and 1917 emphasizes that both the pre- and post-1997 standards were intended to be vertical. In fact, the longshoring standard cited in this case, § 1918.74(a)(8), corresponded to a marine terminal standard at § 1917.45(d)(2).⁷

Florida Power's barge unloader was a shore-based (shore-mounted) material handling operation. As such, the marine terminal standards of Part 1917 applied to unloading the coal from the barges. Part 1918 did not apply to the cited activities. The alleged violation of § 1918.74(a)(8) is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that Item 1 of Citation No. 1 is vacated.

NANCY J. SPIES
Judge

Date: March 15, 1999

⁶ The Secretary's acceptance of the gangway as a line of demarcation for coverage purposes between the marine terminal and longshoring standards was also discussed in *Naporano Iron & Metal Co.*, 17 BNA OSHC 2113 (No. 95,1133, 1996) (ALJ). Further, a shore-mounted crane is determined to be a "shore-based operation," regardless of the fact that the parts of the crane may literally come onto a vessel.

⁷ § 1917.45(d)(2) provides: "No crane or derrick having a visible or known defect that affects safe operation shall be used."